No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,
Appellants,

v.

ROTARY CLUB OF DUARTE, *et al.*,
Appellees.

Appeal from the Court of Appeal of the State of California, Second Appellate District

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BRIEF OF THE CONFERENCE OF PRIVATE ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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The Conference of Private Organizations respectfully submits this brief as amicus curiae in support of the Jurisdictional Statement of the Board of Directors of Rotary International, et al.

INTEREST OF AMICUS

The Conference of Private Organizations ("CONPOR") is a coalition of national, private membership organizations.[1] CONPOR was formed in Order to defend and protect the fundamental rights of its members, and citizens generally, to associate freely and privately upon such terms and conditions as they shall solely determine. CONPOR promotes this right by participating in judicial cases, providing information to legislative and administrative officials, and conducting educational activities.

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[1] The following organizations are members of CONPOR: the Benevolent and Protective Order of Elks, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,650,000 members; the Loyal Order of Moose, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,300,000 members; the Great Council of U.S. Improved Order of Red Men, a benevolent, ritualistic, and fraternal society that charters approximately 940 local lodges, which have approximately 53,616 members; Kiwanis International, a social and service organization that charters approximately 8,200 local Kiwanis clubs with approximately 313,000 individual members; the National Club Association, whose membership consists of over 1,000 private social clubs which have about one million individual members; the National Association of American Business Clubs whose membership consists of 136 private clubs, which have over 6,600 individual members; the United States Power Squadrons, whose membership consists of 450 local groups, which have over 50,000 members.

CONPOR's interest in this case arises from the diversity of membership requirements, limitations, and restrictions of the organizations which it represents. Some of these organizations limit their membership primarily on the basis of broad, objective classifications such as gender, age, religious belief, or literacy. Others rely primarily on subjective membership qualifications such as congeniality, avocation, social status, or economic status. Most employ both types of restrictions to one degree or another. CONPOR believes that the constitutional right of association protects the right of its membership associations to be selective in their core membership functions—voting, holding office, and making policy—on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. Each of these membership policies represents a choice that is within the discretion of the group's members and may not be subject to government control.

All of the associations CONPOR represents contribute to the unique pluralism and diversity of our country. Because state and federal courts have interpreted state civil rights acts in ways that infringe upon the First and Fourteenth Amendment rights of CONPOR's members and similar groups, CONPOR believes this Court should further define the standards it has established to determine these rights. Accordingly, CONPOR submits this brief to show why the Court should note probable jurisdiction in this case.

SUMMARY OF ARGUMENT

This case provides the Court the opportunity to protect the constitutional rights of private organiza-

tions such as Rotary clubs by defining some of the boundaries of the First Amendment protection that extends to these groups. Under the factors the Court announced in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Brennan, J.), groups such as Rotary clubs have a constitutionally protected right of association because they are small, selective, and seek to foster fellowship among their members. Nevertheless, state and federal courts have used the *Roberts* factors to deny these groups their constitutional rights. It is appropriate, therefore, for this Court to note probable jurisdiction in this case.

The Jaycees are a large organization that is controlled at the national level. They are not selective in their choice of members. On the contrary, they actively and publicly recruit new members on the local, regional, and national levels. In addition, the Jaycees admit non-members to many of the functions central to the decision of their members to join the organization. Given these characteristics, it is obvious that the Jaycees fall well outside the boundaries of the First Amendment's protection of intimate association.

Obviously, there are many groups that do not share the Jaycees' characteristics. The locus of control of Rotary and Kiwanis clubs, for example, is the local club, a small group of people. These groups choose their members carefully because they seek to foster fellowship among their members. Thus, they should fall within the boundaries of First Amendment protection.

Unfortunately, the Court has not yet defined those boundaries with any precision. As a result, state and federal courts have improperly held that the mem-

bership decisions of certain groups, including Rotary clubs, are not constitutionally protected from the provisions of public accommodations statutes such as the Unruh Act, Cal. Civ. Code sec. 51 (West 1982). The decisions of these courts have also violated the constitutional rights of members of private organizations not to be associated with a viewpoint to which they object, and they have forced these groups to choose between their constitutional rights of free association and free speech. Because the lack of definition in the *Roberts* case has led to these unfortunate results, this Court should welcome the opportunity to clarify the First Amendment rights of private organizations. Accordingly, the Court should note probable jurisdiction in this case and order briefs on the merits and oral argument.

ARGUMENT

I. STATE AND FEDERAL COURTS HAVE FAILED TO RECOGNIZE THAT PRIVATE ORGANIZATIONS, INCLUDING ROTARY CLUBS, HAVE A CONSTITUTIONALLY PROTECTED RIGHT OF FREE ASSOCIATION

The time has come for the Court to further define the standards it set out in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Brennan, J.). In *Roberts*, the Court held that the Jaycees do not qualify for First Amendment protection either of intimate association or of expressive association. With respect to intimate association, the Court declined to mark the "potentially significant points on this terrain with any precision." 468 U.S. at 620. Instead, it only announced factors to determine how much protection the First Amendment affords the membership decisions of private groups. These factors include "size,

purpose, policies, selectivity, and congeniality." 468 U.S. at 620.

The Court in *Roberts* did not have to mark the boundaries of First Amendment protection, because, whatever these boundaries are, it is clear that the Jaycees fall outside them. The local chapters of the Jaycees are large and basically unselective groups. Age and gender are the only membership criteria used at either the local or national level, and the Jaycees admit women as associate members. Furthermore, people of both genders who are not members of the Jaycees often participate in many activities central to the decision of many members to associate with one another, including awards ceremonies, community programs, and recruitment meetings. 468 U.S. at 621.

Because local Jaycees chapters are neither small nor selective, the Court refused to extend the First Amendment protection of intimate association to them. Other private groups, however, do not fall so clearly outside the bounds of constitutional protection. Nevertheless, based on the Court's decision in *Roberts*, other courts have seen fit to refuse to extend First Amendment protection to these groups' memberships decisions in the face of state statutes prohibiting gender discrimination in businesses or places of public accommodation.

Kiwanis clubs, for example, have admitted only men to membership since the group was founded in 1915. Local Kiwanis clubs have an average of thirty-eight members, a far cry from the 400 members of the Minneapolis chapter of the Jaycees in *Roberts*. *Kiwanis International v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381, 1383 (D.N.J. 1986). *See also* Constitution and Bylaws of Kiwanis International (as

amended to and including June 26, 1984) ("Kiwanis Constitution and Bylaws"). Unlike the Jaycees, who make an active effort to recruit new members at the local, state, and national levels, *Roberts*, 468 U.S. at 613-14, the Kiwanis are selective in whom they admit to membership. Members of Kiwanis clubs must be engaged in or retired from "recognized lines of business, vocation, agriculture, institutional or professional life." Further, a member of another local Kiwanis club or another service club of similar character is not eligible for membership in a local Kiwanis club, except for honorary membership. Kiwanis Constitution and Bylaws.

One factor that influenced the Court's decision in *Roberts* was the control the Jaycees national headquarters exercised over local Jaycees chapters. *See Roberts*, 468 U.S. at 613-14. The structure of Kiwanis, however, is different. A man who joins a Kiwanis club does not join a national organization in the way a Jaycees member does. Instead, he joins a local Kiwanis club, which is intimate and selective in its choice of members. The average Kiwanis club has only thirty-eight members, and one of the stated objects of Kiwanis clubs is to foster enduring friendship among their members. *See Kiwanis*, 627 F. Supp. at 1388; Kiwanis Constitution and Bylaws. The local Kiwanis clubs as entities are members of Kiwanis International, which exists primarily to charter new clubs and to ensure that clubs abide by the Kiwanis Constitution and Bylaws. *See* Kiwanis Constitution and Bylaws.

Despite the differences between Kiwanis and the Jaycees, the district court in the *Kiwanis* case applied *Roberts* and held that the First Amendment did not

protect the membership choices of Kiwanis clubs. The decision of the California Court of Appeals in the instant case similarly overlooks the differences between the Jaycees and Rotary clubs.

Rotary clubs are similar to Kiwanis clubs in many respects. The primary purpose of Rotary is to encourage fellowship among business and professional men who are representative of the local community. Membership in Rotary clubs is by invitation only and is highly selective. Rotarians join local clubs, and the local clubs as entities are members of Rotary International. 1 *Rotary Basic Library, Focus on Rotary* 1-2.

The *Kiwanis* case and the instant case illustrate the need for this Court to point out some of the markers on the terrain of First Amendment protection for private organizations. Local Rotary clubs and Kiwanis clubs are intimate and selective. Unlike the Jaycees, they do not "sell" new memberships. Nor do they permit women to participate in their organizations as associate members. Rotary and Kiwanis clubs thus fall within the bounds of First Amendment protection, and, therefore, their right of intimate association is entitled to protection. The rights of other groups that are even more intimate and selective may be entitled to greater protection. Nevertheless, without further definition of the principles set out in *Roberts*, these groups may face the same fate in federal and state courts that the Rotarians did in the instant case.

Because local Rotary and Kiwanis clubs are intimate associations, the First Amendment's guarantee of freedom of association prevents the State from interfering with their membership decisions, absent a

compelling justification. In *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), the Court held that the actions the State may take against groups with selective memberships is very limited, even if these groups discriminate on the basis of race. Specifically, the Court concluded that the State may not exclude such a group from a public park merely because it has an "all-Negro, all-Oriental, or all-white" membership policy. 417 U.S. at 575. The Court quoted with approval the dissenting opinion of Justice William O. Douglas joined by Justice Thurgood Marshall (417 U.S. at 575) in *Moose Lodge No. 107 v. Irvis*:

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. 163, 179-80 (1972) (footnote omitted). Justice Blackmun in *Gilmore* explained why freedom of association should protect groups that restrict their membership:

> The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and ensures peaceful, orderly change.

Gilmore, 417 U.S. at 575.

In *Roberts*, the Court recognized that the protection the Constitution affords to intimate groups is equivalent to the protection it affords to the family relationship. "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)." *Roberts*, 468 U.S. at 618. Such relationships qualify for constitutional protection because they cultivate shared ideals and beliefs, thus acting as buffers between the individual and the power of the State. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (freedom to marry is a fundamental personal liberty);[2] *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (right of extended family to live together is constitutionally protected); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1973) (right of Amish parents to dictate education of their children according to their beliefs is constitutionally protected); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (state interference in procreative

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[2] *See also Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

choices is unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. at 535 (state may not prohibit parents from educating their children in private schools). *See also Gilmore v. City of Montgomery*, 417 U.S. at 575; *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958).

The Court in *Roberts* also recognized that it is appropriate to afford intimate relations constitutional protection because people derive much of their emotional enrichment from close ties with others and "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. *See, e.g., Ouilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." *Roberts*, 468 U.S. at 619.

It is appropriate to afford the same constitutional protection to private clubs such as Rotary and Kiwanis, because their members share ideals and beliefs and seek to form close relationships with one another. Nevertheless, because the *Roberts* opinion does not set any clear boundaries of First Amendment protection for such groups, state and federal courts fail to protect these groups' constitutional rights. Consequently, this Court should take the opportunity to define these boundaries by noting probable jurisdiction in this case and ordering briefs on the merits and oral argument.

II. STATUTES SUCH AS THE UNRUH ACT, AS THE COURTS APPLY THEM TO PRIVATE ORGANIZATIONS, VIOLATE THE CONSTITUTIONAL RIGHT OF MEMBERS OF THOSE ORGANIZATIONS NOT TO BE ASSOCIATED WITH A VIEWPOINT TO WHICH THEY OBJECT, AND THEY FORCE CLUB MEMBERS TO CHOOSE BETWEEN THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH AND FREE ASSOCIATION

This Court should note probable jurisdiction in this case because decisions like that of the Court of Appeals often force members of private clubs to choose between their right to associate with intimate friends of their choice and their right not to be connected with a message they find objectionable. "[G]overnment may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1982) (Rehnquist, J.) (citing *Perry v. Sinderman*, 408 U.S. 593 (1972) and *Speiser v. Randall*, 357 U.S. 513 (1958)); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). The Court of Appeals' decision forces a more egregious decision on members of Rotary clubs other than the Duarte club: they must decide whether they will continue to associate with other members of their club or whether they want people to connect them with the position that women should be members of Rotary clubs, a position with which they may disagree. If it means anything for a person to have a constitutionally protected right, it means the State may not force him to make such a choice.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705,

714 (1977) (Burger, C.J.). *See also Pacific Gas and Electric Co. v. Public Utilities Commission*, 54 U.S.L.W. 4149 (1986) (unconstitutional for a state to require a utility to distribute in its billing envelopes literature with which it disagrees); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute that required newspapers to publish replies of candidates whom they had criticized held unconstitutional); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 642 (1943) (compulsory flag salute held unconstitutional). In *Wooley*, the Court held that New Hampshire could not prosecute Jehovah's Witnesses for covering the state motto, "Live Free or Die," on their automobile license plates. The Jehovah's Witnesses objected to the slogan on political, religious, and moral grounds. The Court held that government could not force the Jehovah's Witnesses to be the instrument for a message they found unacceptable. "In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' " *Wooley*, 430 U.S. at 715 (*quoting Barnette*, 319 U.S. at 624).

Court orders that prevent private organizations from excluding from their membership groups who refuse to abide by the organizations' membership requirements place the members who prefer to abide by the requirements in a position analogous to that of the Jehovah's Witnesses in *Wooley*. In addition to other requirements, Rotary and Kiwanis clubs have always restricted their membership to men. Other private organizations limit their membership on the basis of other subjective or objective criteria. These organizations have invested time, money, and energy over

the years to develop the reputation their names and identifying insignia convey to the public. That reputation includes their membership restrictions, and, in some cases, these restrictions are based on gender. Nonetheless, because of the Court of Appeals' decision in the instant case, when Rotarians attend their local club meetings, wear a Rotary shirt, or do anything else connected with Rotary, some people may believe they favor admitting women to Rotary clubs. The existence of this lawsuit indicates that some Rotarians consider this message unacceptable.

Most people who saw New Hampshire's motto on the Jehovah's Witnesses' license plates probably would not have assumed the Jehovah's Witnesses advocated or even accepted the philosophy of the motto. Nevertheless, the Court in *Wooley* found it sufficient that some person might connect them with the message they found unacceptable. *See* 430 U.S. at 715.

Similarly, most people probably would not assume that a local Rotary club member advocates admitting women simply because he wears the same Rotary symbol that members of the Rotary Club of Duarte wear. All that *Wooley* requires, however, is that some person might make that assumption. The Rotarians might be able to alleviate the problem somewhat by publishing a disclaimer, but that is also inadequate under *Wooley*. The Court implicitly rejected the argument that the Jehovah's Witnesses could put a disclaimer next to the license plate. *See* 430 U.S. 714-15. Likewise, in *Pacific Gas and Electric Co.*, the Court considered it inadequate protection that authors of opposing viewpoints had to indicate that their messages were not those of the utility and that the utility had the opportunity to respond to the messages. *See*

54 U.S.L.W. 4151, 4154. Government may not force upon someone the appearance of believing something he does not in fact believe:

> The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.

Barnette, 319 U.S. at 645 (Murphy, J., concurring).

So long as dissident groups such as the Rotary Club of Duarte do not use their parent organization's name or insignia, there is no danger that people will think other members of the organization are in favor of altering the organization's membership requirements. The parent organizations do not seek to force the dissident groups to disband. All they ask is that dissident groups do not identify themselves with the parent organization when they violate the membership requirements of the organization.

Decisions such as that of the Court of Appeal in the instant case not only force members of private organizations to be associated with a viewpoint to which they object; they also force these members to choose between their constitutionally protected right of association and their constitutionally protected right of free speech. These members must either leave their local club, of which they may have been a member for years, or they must risk being associated with a position that they consider objectionable. A state's

interest in eliminating discrimination cannot be so strong as to force people to make such a choice. If the government may not require a person to give up a constitutionally protected right to receive a benefit, *FCC v. League of Women Voters*, 468 U.S. 364; *Regan*, 461 U.S. at 540; *Perry*, 408 U.S. 593; *Speiser*, 357 U.S. 513, it may not require a person to give up one constitutional right to exercise another.

Because the decision of the Court of Appeals in the instant cases forces Rotarians to be associated with a viewpoint to which they object, and because it forces them to choose between their constitutionally protected right of association and their constitutionally protected right of free speech, this Court should note probable jurisdiction in this case and Order briefs on the merits and oral argument.

CONCLUSION

According to the factors this Court announced in *Roberts*, the freedom of association of members of many private organizations is protected by the First Amendment because the organizations are small in size, selective in membership, and seek to foster fellowship among their members. Local Rotary clubs are one example of groups to whom this protection should extend. Nevertheless, decisions such as that of the Court of Appeals in the instant case deny this protection to these organizations. Such decisions also violate the right of members of private organizations not to be associated with a viewpoint to which they object, and they force these members to choose between their constitutionally protected rights of free speech and free association.

The Court could better protect the constitutional rights of private organizations by further defining the boundaries of First Amendment protection for such groups. Such definition was unnecessary in *Roberts* because the Jaycees fell clearly outside these boundaries. Many groups, however, including Rotary clubs, fall within them, and this Court should avail itself of the opportunity to protect their constitutional rights. Recalling Justice Brandeis' famous words --

> The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.
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> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning, but without understanding.[3]

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[3] *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).

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